

disputed medical expenses. He awarded claimant a 12 percent permanent partial impairment of function to the left upper extremity at the level of the shoulder, based on the medical opinion of Dr. Prostic.

Respondent argues the evidence in this matter does not support claimant's assertion that she suffered an injury which arose out of and in the course of her employment, that claimant failed to provide timely notice of any alleged injury, and there is no "just cause" for this failure. Respondent argues the Award of ALJ Moore should be reversed and claimant denied compensation.

Claimant argues first that ALJ Moore did not have the authority to make findings regarding whether she sustained an accidental injury arising out of and in the course of her employment or whether she gave timely notice because those issues were already litigated before the Board and findings were made. Claimant contends the Board was clear that, on remand, ALJ Moore was to make findings regarding the issues not already decided. Therefore, since respondent has not appealed any of the issues on remand, its appeal should be held for naught.

Second, claimant argues she is due and owing temporary total disability benefits from the date of her injury to February 4, 2011, because she was terminated by respondent shortly after the injury and was not able to work due to restrictions. Finally, claimant argues there is sufficient evidence to order respondent to pay medical bills incurred as authorized medical treatment.

Issues on Appeal

1. Did ALJ Moore exceed his jurisdiction in determining whether claimant provided proper statutory notice of her injury?;
2. Did ALJ Moore exceed his jurisdiction in determining whether claimant suffered an injury that arose out of and in the course of her employment with respondent?;
3. What is the nature and extent of claimant's injuries and disability?;
4. Is claimant entitled to additional temporary total disability compensation (TTD)?;
5. Is respondent responsible for payment of claimant's medical bills?

FINDINGS OF FACT

A detailed analysis of the Findings of Fact is contained in the Board's Order of June 20, 2012, and will not be repeated herein. The Board adopts those findings of fact herein. This is not the first time this matter has been before the Board on appeal.

1st Appeal

On August 10, 2010, Administrative Law Judge Thomas Klein found, after a preliminary hearing, that claimant failed to give timely notice of her alleged accidental injury, and therefore denied the requested benefits.

Claimant appealed to the Board requesting review of whether ALJ Klein erred in denying her claim due to lack of timely notice. She argued that she told her supervisor as well as respondent's health and safety coordinator that she had injured her neck, shoulder and arm in a work-related accident. And she further argued she told them about the incident the day it had occurred.

Respondent argued that claimant never told her supervisor or the health and safety coordinator that she had been hurt at work. Instead, she left work to seek medical treatment with her personal physician and requested time off under the Family Medical Leave Act. It was not until her employment was terminated for failure to follow the requirements for additional leave pursuant to the Family Medical Leave Act that she finally claimed a workplace injury. Consequently, respondent further argued that claimant failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment. In the alternative, respondent argued claimant failed to provide timely notice of her accident. Respondent noted that claimant alleged a discrete injury on January 11, 2010, on all the written exhibits, but at preliminary hearing changed her testimony to indicate the accident date occurred on January 12, 2010.

A single Board Member found claimant failed to meet her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment with respondent.

2nd Appeal

On March 1, 2012, ALJ Moore found, after the regular hearing, that claimant failed to demonstrate that she suffered personal injury by accident and failed to establish that her claimed injuries arose out of and in the course of her employment. ALJ Moore further found that the claimant did not provide respondent with timely notice of her alleged accident.

Claimant appealed, arguing that ALJ Moore erred in finding she failed to prove she suffered personal injury by accident that arose out of and in the course of her employment with respondent and in finding that she failed to give respondent timely notice of her accidental injury. Claimant asked that the Board reverse ALJ Moore and remand the case for findings on claimant's remaining issues, including the nature and extent of disability.

Respondent asserted that ALJ Moore's Award should be affirmed in its entirety.

The Board, in its June 20, 2012 Order, reversed ALJ Moore and found that claimant satisfied her burden of proving that she suffered an accident and injury on January 12, 2010, that arose out of and in the course of her employment with respondent. The Board further ruled that claimant gave respondent timely notice of her work-related accident. The matter was reversed and remanded to ALJ Moore for a determination of the issues not addressed by the ALJ in the March 1, 2012, Award.

Claimant argues that ALJ Moore exceeded his jurisdiction in making a ruling on whether claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent and on timely notice of the accident. However, a review of the July 25, 2012, Award on Remand does not support claimant's concerns. While ALJ Moore discussed those issues in detail, he ultimately acknowledged the Board's earlier ruling on both issues. While ALJ Moore did nothing to disguise his disdain for the Board's earlier rulings, he, nevertheless adopted those same rulings. One can only speculate as to why ALJ Moore felt the unnecessary need to discuss those issues in such detail. Now, respondent appeals those issues from the July 25, 2012, Award on Remand. Therefore, only those issues must be addressed by the Board.

At the request of her attorney, claimant was examined by board certified orthopedic surgeon, Edward J. Prostic, M.D., on March 1, 2010, and again on February 4, 2011. As the result of the February 4, 2011, examination, Dr. Prostic determined that claimant had suffered a 12 percent permanent partial impairment of function to her left upper extremity at the level of the shoulder. This rating, which was provided pursuant to the 4th ed. of the *AMA Guides*¹, is the only rating contained in this record. Dr. Prostic recommended additional physical therapy, anti-inflammatory medicine and steroid injections. If that course of treatment proved unsuccessful, then an MRI with contrast or arthroscopy would possibly follow. There is no other medical opinion in this record addressing the need for additional medical treatment. Additionally, in the March 1, 2010, report, Dr. Prostic determined that claimant was capable of performing light duty only, with avoidance of the use of her left hand above shoulder level.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

Respondent attempts to resurrect the issues dealing with whether claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent and whether she provided respondent with timely notice of her accident. Both issues were determined in claimant's favor by the Board in its decision of June 20, 2012. An appeal to the Kansas Court of Appeals was dismissed on September 11, 2012, after respondent failed to address the court's concerns about its jurisdiction over the issues raised on appeal. The matter was then remanded to ALJ Moore for a determination of the heretofore undecided issues. The ALJ then issued the July 25, 2012, Award on Remand, based upon the identical record utilized by both ALJ Moore and the Board in their earlier decisions. Whether the Board's decision on those issues are correct, or not, those rulings become the law of the case.

The doctrine of the law of the case has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate review, sec. 605 in the following manner:

The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issue to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.

Here the Board has determined both that claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent and that claimant provided timely notice of her alleged accident. Respondent's appeal is based upon the identical record earlier considered by the Board. The law of the case applies and respondent's appeal on these issues is dismissed.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁴

As noted by ALJ Moore, there is only one impairment rating contained in this record. The 12 percent left shoulder permanent partial functional impairment opinion of Dr. Prostic is adopted by the Board. The determination by ALJ Moore on this issue is affirmed.

Claimant also requests additional TTD through February 4, 2011. However, only Dr. Prostic addressed claimant's ability to return to work. He found claimant capable of returning to work, light duty, with limited use of the left upper extremity. There is no indication in this record that claimant was temporarily and totally disabled with those restrictions. It is claimant's burden to prove her entitlement to the benefits requested. The Board finds that burden has not been satisfied by claimant. The denial of additional TTD is affirmed.

Claimant also contends entitlement to the payment of medical bills associated with the treatment of her work-related injuries. K.S.A. 44-510h makes it respondent's responsibility to provide health care services as may be reasonably necessary to cure and relieve the employee from the effects of the injury. K.A.R. 51-9-10 requires medical bills be itemized and presented upon the completion of treatment. There is no indication in this record that any medical bills have been presented as required. It is claimant's burden to prove her entitlement to the benefits requested. As noted by ALJ Moore, claimant has failed to identify any unpaid or disputed medical expenses. The Award on Remand of the ALJ on that issue is affirmed.

CONCLUSION

The Award on Remand of ALJ Moore is affirmed. Whether claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent, and whether she provided timely notice of her accident are issues already determined by the Board. Claimant has proven that she suffered a 12 percent permanent partial functional impairment to her left upper extremity at the level of the shoulder and is entitled to future medical treatment upon proper application and approval. Claimant's requests for the payment of unidentified medical bills and additional TTD are denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award on Remand of Administrative Law Judge Bruce E. Moore dated July 25, 2012, is affirmed.

⁴ K.S.A. 44-510e(a).

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
wlp@wlphalen.com

Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
bwebb@hdwlawfirm.com

Bruce E. Moore, Administrative Law Judge